Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-334

PATRICIA ANNE NORTH,
Respondent,

vs.

KENNETH E. NORTH,
Petitioner.

PETITION FROM THE SUPREME COURT OF KANSAS
KANSAS SUPREME COURT CASE NO. 47701

PETITION FOR WRIT OF CERTIORARI

KENNETH E. NORTH
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BLEED THROUGH

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PETITION FOR WRIT OF CERTIORARI REVIEW

I. GENERAL SUMMARY:

This action is a petition for writ of certiorari taken from the final ruling of the Kansas Supreme Court in *North* v. *North*, Kan., 535 P.2d 914, in which the judgment of the Johnson County, Kansas District Court granting a decree of divorce to plaintiff on the grounds of incompatibility was upheld.

Defendant-petitioner, in appealing from the judgment and orders rendered by the trial court on April 22, 1974, directly assaulted the basis for the District Court's ruling, simultaneously challenging the operative law under which relief was granted, K.S.A. 1974 Supp. 60-1601(8), as an enactment that was repugnant to the United States Con-

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stitution. The Kansas Supreme Court affirmed the lower court's decision on May 10, 1975, ruling that the statute was in fact constitutionally valid. Appellant moved the reviewing court for a rehearing on May 19, 1975, alleging numerous procedural and substantive errors in the concurring court's decision. The motion for rehearing was denied on June 2, 1975, and the Kansas Supreme Court issued its mandate in the action on June 5, 1975.

This petitioner consequently filed a notice of appeal to the Supreme Court of the United States with the Clerk of the Kansas Supreme Court on June 5, 1975, invoking the higher court's jurisdiction in accordance with the provisions of 28 U.S.C. § 1257(2).

On September 2, 1975, the above-referenced appeal was docketed with the Clerk of the United States Supreme Court pursuant to U.S. Sup. Ct. Rule 13. This petition, filed with the Court on the same date, seeks to have an additional legal issue argued below—but not intrinsically related to the statutory challenge—incorporated into the consideration of issues now before the Court on appeal.

Petitioner seeks this expanded scope of review pursuant to 28 U.S.C. § 1257(3), contending that his right to due process of law provided for by the Fourteenth Amendment to the U.S. Constitution has been abridged.

This petition exclusively confines itself to the question of due process in this action, both at the trial and state review level. Specifically, two questions are raised herein for this Court's consideration:

A. May a trial court reach a conclusive determination on the merits of an issue after a preliminary hearing and before the trial without violating due process?

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B. May a review court decline to address a question of law properly presented on appeal without violating due process?

Both questions rely entirely on the Fourteenth Amendment, United States Constitution, which states that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.
>
> U.S.C. Const. Amend. 14 § 1.
>
> (P. 3-4, Constitution of the United States, Annotated).

II. STATEMENT OF THE CASE:

Questions of law presented by this petition are profoundly simple in their factual composition.

On April 22, 1974, the Johnson County, Kansas District Court, Division I, considered this case on the merits. Upon the conclusion of plaintiff's case-in-chief and its submission to the court, the trial court made several preliminary remarks for the benefit of both parties prior to announcing its findings and the resulting conclusion of law.

Intent on explaining his philosophy and application of law to the instant case, the Honorable Herbert W. Walton, Division I District Court Judge, made the following statement:

> I cannot help but look back at the hearing I had . . . concerning the need for and the futility of marriage counseling. *The Court, after having heard all of that evidence, made a decision that it would be futile in this particular case for the parties to try to resurrect a marriage that is already buried* . . . (R. 79) (italics added).

Since there was no specific indication during the trial itself that the court had already reached a conclusion on the merits of plaintiff's prayer-for-relief after considering evidence adduced at a preliminary hearing on defendant's motion for court-sponsored marriage counseling (R. 6), petitioner's first opportunity to challenge this alleged deprivation of due process came on appeal to the Kansas Supreme Court.

The due process question raised initially here was summarized in "point four" of an amended statement of points filed with the District Court on August 30, 1974 pursuant to Kansas Sup. Ct. Rule Six, thereby reviewable under rule and prevailing case-law:

> 4. The defendant was effectively denied due process in that the trial court had concluded that the marriage could not stand prior to the onset of trial. (R. 22).

Petitioner essentially argued below that no amount of rationalization would change the simple fact that the trial court had, by its own unequivocal admission, effectively rendered judgment in favor of plaintiff prematurely and prior to the onset of trial. (P. 24, Brief of Appellant). Defendant-Petitioner's brief invited the Kansas Supreme Court's attention to the fact that it had, on previous occasions, ruled that "due process of law . . . held to mean that a law hears before it condemns, which proceeds on

inquiry, and renders judgment only after trial." *Motor Equipment Company* v. *Winters*, 146 Kan. 127, 69 P.2d 23, 28; *Wichita Council No. 1, etc.* v. *Security Benefit Association*, 138 Kan. 841, 28 P.2d 976, 980, 94 A.L.R. 629.

Plaintiff-respondent argued in her brief that the trial court had no alternative but to reach a premature conclusion on the merits in order to dispose of defendant's own motion for court-sponsored counseling:

> In short, the Court is saying at the conclusion of the first hearing it found that the marriage appeared to be in an irreconcilable posture (which the Court properly was required to do in order to justify denial of defendant's own motion for marriage counseling) and that *again* at the conclusion of the trial itself the Court also found that from the additional evidence therein adduced, it still felt that the marriage was in an irreconcilable posture. (P. 20, Brief of Appellee).

The review court's decision, however, made no reference to either party's argument or to the validity of the defendant's due process challenge. The question simply wasn't passed on.

Presumably, the Kansas Supreme Court felt that it had disposed of the matter when it concluded that the action was not a unilateral divorce, thereby rendering all constitutional questions moot. The Court's explanation closed with the observation that "All points raised by defendant have been considered and found to be without merit. . . ." *North* v. *North*, Kan., 535 P.2d 917.

Petitioner's motion for rehearing respectfully reminded the review court that it had not resolved the due process question and that, since the procedural issue involved transcended questions of evidential character or scope, its rejec-

tion of defendant's unilateral interpretation had no bearing whatsoever on the due process point. (Count IV, P. 3, Mot. for Rehearing).

Plaintiff-respondent countered in her answer to the motion with an assertion that:

> The appellee's brief met that argument and it is patently without merit. The argument is even more specious than all of the other arguments of appellant in his brief (which may be the reason why appellant did not even choose to mention it in his oral argument) and there is certainly no reason why this Court is required to specifically mention such a transparently fallacious assertion in its written decision. (P. 3, Appellee's Response in Opposition to Appellant's Memorandum Motion for Rehearing).

The Supreme Court of Kansas denied the motion for rehearing without comment on June 2, 1975, thereby necessitating this petition in order that defendant-petitioner's asserted due process rights may be conclusively adjudicated.

III. BASIS FOR CERTIORARI PETITION:

The substantive thrust of petitioner's cause here is twofold:

A. The Trial Court's Premature Finding Abridged Defendant's Right to Due Process

The fact that the trial court rendered judgment on the pivotal issues prior to the trial in this action is not contested by plaintiff-respondent, who argues instead that it was necessary for the trial court to address the issue of

"irreconcilable differences" in order to rule on defendant's motion for marriage counseling.

Yet, given the fact that plaintiff sought a divorce on the exclusive grounds of incompatibility, it is readily apparent that "irreconcilable differences" was the basic issue to be addressed by the trial court when the case was heard on the merits.

The substantive question controlling at this point, then, is whether or not that premature conclusion was actually prejudicial to defendant's constitutional right to a fair and impartial hearing, or was simply a preliminary finding consistent with that stage of the proceedings and a necessary response to defendant's own motion.

There is probative value to plaintiff's assertion that the trial court was simply discharging its statutory duty in the exercise of discretion invested in it by K.S.A. 1974 Supp. 60-1608 which entitled the court to evaluate the constructive potential for marriage counseling; and if the petition for divorce itself rested on grounds other than incompatibility, there would be no constitutional conflict interposed here.

Petitioner maintains, however, that his motion for marriage counseling neither asked nor authorized the trial court to address any other issue than whether or not counseling would be beneficial—a decision that could have been made on the basis of an inquiry that fell short of addressing the issue of any alleged "irreconcilable differences". If the trial court felt compelled to consider that issue in order to rule on the defendant's motion, the ruling should have been stayed until the cause had been heard on the merits at the trial itself. The statute involved invests significant discretionary latitude in the District Court that would clearly

encompass a postponement until the issues had been placed in proper sequence.

The very fact that the decision reached by the trial court after the trial uniquely coincides with the decision reached by the same court after a preliminary hearing held weeks earlier is indicative of predisposition. To suggest that the court could have readily "reversed" its first conclusion had the evidence adduced at the subsequent hearing so warranted is to ignore the indisputable realization that human thought processes exert their own special momentum, an intellectual inertia that, once initiated, naturally and understandably seeks reinforcement rather than rejection.

Further, it is submitted that, while the law envisions circumstances in which plenary police power may infrequently impinge upon basic constitutional rights, it also anticipates an affirmative effort to either avoid or at least minimize the deprivations effected by the execution of statutory prerogatives.

In a 1921 case originating in Arizona, this Court held that:

> Due process of law requires that every man shall have the protection of his day in court and the benefit of the general law which hears before it condemns, and proceeds not arbitrarily, but upon inquiry, and renders judgment only after trial. *Truax* v. *Corrigan*, 42 S. Ct. 124, 257 U.S. 312, 66 L.Ed. 254, 27 A.L.R. 375.

Petitioner therefore respectfully submits that the premature finding in favor of plaintiff proceeded arbitrarily and predictably to a pre-determined conclusion, and further rendered inquiry conducted during the trial itself meaningless, superficial, and redundant.

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The inevitable result was a ruling in obvious conflict with a reasonable interpretation of applicable decisions on due process handed down by this Court.

B. The Review Court's Declination Constituted a Further Denial of Defendant's Due Process Rights

Whatever the relative validity of this petitioner's assertion that the trial court's premature finding deprived him of due process, it is incontestable that it represented a question of "ponderable legal significance".

The working application of related statutes in this case generated an apparent dilemma unanticipated by the Legislature that could potentially evolve into a patterned deprivation of due process neither intended nor contemplated. That conflict alone would, by the standards of any prudent observer, present a question of law within the implicit jurisdiction of a state supreme court.

The salient issue here, however, is whether or not a "non-responsive" review even constitutes a "hearing", either within the meaning of the *Truax* ruling or due process doctrine.

It is clear on the face of the record itself that the Kansas Supreme Court did not address the issue of due process raised by defendant-petitioner, notwithstanding the fact that it was a properly-presented question of law brought on in strict compliance with the review court's own rules and the law of the forum.

Petitioner is inclined to suspect that an appellate court that "hears no error, sees no error, and speaks no error" might simply not be listening. When a review court makes no mention whatever of an issue—particularly a constitu-

tional issue—and postures no explanation detailing why the question has been discounted, a litigant's day in court is of dubious value, and the protection of the law is reduced to the appearance of a paper shield.

But most assailable is plaintiff-respondent's suggestion that the court need not respond at all if it chooses not to, an utterly untenable assertion that represents a monumental affront to judicial integrity.

Whatever the merits of a litigant's position, the appearance of fairness implicit in the due process concept requires, at base, either a rational explanation as to why the party's argument must succumb or some reference to applicable decisions of other courts that the defeated party may have recourse to.

No known source of law invested the American judiciary with a special measure of celestial insight entitling courts to rule as they exclusively see fit, handing down decisions from Olympian heights to solicitous and subservient subjects below. The Constitution that created the judicial function evolved from the doctrine of "right reason", mandating by clear and compelling implication that the courts rely on that same source of legitimacy in their day-to-day tasks.

Reliance on basic reasoning to which men of average intelligence and ordinary means could readily subscribe to is part and parcel of the social contract—as relevant and valid now as it was in the earliest days of the Republic.

Both the sovereignty and continuing viability of the Judicial Branch is wholly contingent upon the assumption that court decisions will be both rationally based and intelligently communicated in order that the public support so necessary to their ongoing acceptance will be as enlightened as it is volitional.

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For that reason, petitioner respectfully submits that he is entitled to some semblance of inquiry into his asserted constitutional claim and therefore prays that this Court will permit him to consolidate the due process question framed herein with the other issues in this action currently before the Court on direct appeal.

KENNETH E. NORTH
Petitioner, Pro Se

Please consult the Appendix in the Jurisdictional Statement filed in this action for reference to the subject decision and ruling on motion for rehearing.

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5537 Neosho Lane
Shawnee Mission, Kansas 66205

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Olathe, Kansas 66061

ATTORNEYS FOR RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Petitioner's request for a writ of certiorari from this Court moves laboriously through the development of basic constitutional law with regard to litigants' rights to due process.

No one argues with him there, but his application of that constitutional principle to this case is absurd. At bottom, his argument is that the Court made a certain statement at the conclusion of the trial of this case and that statement proves that the court had pre-judged the case and, hence, not given petitioner a fair hearing. In fact, the statement indicates quite the opposite. The statement:

> "I cannot help but look back at the hearing I had...concerning the need for and the futility of marriage counseling.
>
> "The Court, after having heard all of that evidence, made a decision that it still feels was correct from the evidence, that it would be futile in this particular case for the parties to try to resurrect a marriage that is already buried, and it is simply serving no good reason to put people through a situation of anguish, frustration and additional expense if the marriage is not viable." (ROA 79)

It is submitted that even by a casual reading of those words, it is clear that the Court meant that it "made a decision" at the end of the hearing on the petitioner's motion for marriage counseling that to order marriage counseling "would be futile" and that it would simply serve "no good reason to put people through a situation of anguish, frustration and additional expense (of marriage counseling) if the marriage is not viable". The Court is also saying that now (at the time the words were spoken) after the trial of the divorce itself "it <u>still</u> feels it was correct from the (additional) evidence" (italics added) adduced in the trial of the divorce itself, in

again finding that the marriage is not viable and that the grounds of incompatibility lie.

In short, the Court is saying that at the conclusion of the first hearing it found that the marriage appeared to be in an irreconcilable posture (which the Court properly was required to do in order to justify denial of defendant's own motion for marriage counseling), and that <u>again</u> at the conclusion of the trial of the divorce itself the Court also found that from the additional evidence therein adduced, it still felt that the marriage was in an irreconcilable posture.

The Court listened to evidence in both hearings and concluded that there was no evidence in the second hearing that would lead to a different conclusion than the evidence adduced in the first hearing. The petitioner appears to not comprehend that the Court had no choice but to make a decision with regard to the essential viability of the marriage at the end of the first hearing on a motion for marriage counseling. That fact does not in and of itself mean that the Court did not listen in an open and fair-minded way to all of the additional evidence adduced in the trial of the divorce itself.

The petitioner's point with regard to due process is not only totally without merit, but is particularly hypocritical in view of the fact that petitioner did not present any new evidence of any sort in the second hearing and, therefore, could hardly expect the Judge to arrive at a different conclusion.

BLEED THROUGH

(Interestingly, if this Court were to hold that a trial court, after hearing evidence on a motion for marriage counseling, could not find that the marriage was not in a posture for likely reconciliation because such a finding constituted a prejudgment of the existence of grounds for divorce at a later trial, a trial court would be in a position where it could never deny a motion for marriage counseling for fear that such denial constituted a prejudgment of the grounds for divorce.)

Finally, the petitioner complains that the Supreme Court of Kansas did not address itself to this particular argument. Not only is the Kansas Supreme Court not required to explain its review in detail of each of the petitioner's assertions, but particularly in view of the fact that this particular assertion is patently void of any substance (and in fact was not even argued by the petitioner himself in oral argument before the Kansas Supreme Court), it certainly is little wonder that it was not specifically addressed by the Kansas Supreme Court.

Respondent respectfully submits that petitioner's assertion of a lack of due process in the trial of the issue of the parties' incompatibility is utterly without merit and a writ of certiorari should not issue.

JOHN H. JOHNTZ, JR.
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The Tower Building, Box 151
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913-782-2500

ATTORNEYS FOR RESPONDENT

1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH E. NORTH,

Petitioner,

v. No. 75-334

PATRICIA ANNE SANTEE,
formerly PATRICIA ANNE NORTH,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Comes now respondent and moves the Court for leave to proceed in this matter in forma pauperis. In support thereof, respondent has attached an affidavit hereto.

JOHN H. JOHNTZ, JR.
PAYNE & JONES, CHARTERED
The Tower Building, Box 151
Olathe, Kansas 66061
913 782-2500

ATTORNEY FOR RESPONDENT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, pursuant to Rule 33 of the United States Supreme Court, a copy of the above and foregoing Motion for Leave to Proceed In Forma Pauperis was deposited in the United States Mail, postage prepaid, to Kenneth E. North, 5537 Neosho Lane, Shawnee Mission, Kansas 66205, Petitioner Pro Se, this 17th day of October, 1975.

John H. Johntz, Jr.

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REMAINDER OF PAGE

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Comes now respondent and moves the Court for leave to proceed in this matter in forma pauperis. In support thereof, respondent has attached an affidavit hereto.

JOHN H. JOHNTZ, JR.
PAYNE & JONES, CHARTERED
The Tower Building, Box 151
Olathe, Kansas 66061
913 782-2500

ATTORNEY FOR RESPONDENT

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John H. Johntz, Jr.

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH E. NORTH,

Petitioner,

v. No. 75-334

PATRICIA ANNE SANTEE,
formerly PATRICIA ANNE NORTH,

Respondent.

AFFIDAVIT

STATE OF KANSAS)
) SS:
COUNTY OF JOHNSON)

Patricia Anne Santee, of lawful age, upon her oath being first duly sworn, states:

1. That she is the respondent herein.

2. That she has no interest whatsoever in any real property nor has she ever had.

3. That the only property she owns is an automobile and a small amount of furniture.

4. That she is not employed and has not been employed for some months.

Further, affiant saith not.

Patricia Anne Santee

Subscribed and sworn to before me this _____ day of October, 1975.

BLEED THROUGH

v. No. 75-334

PATRICIA ANNE SANTEE,
formerly PATRICIA ANNE NORTH,

Respondent.

AFFIDAVIT

STATE OF KANSAS)
) SS:
COUNTY OF JOHNSON)

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Further, affiant saith not.

Patricia Anne Santee

Subscribed and sworn to before me this _____ day of October, 1975.

Notary Public

My commission expires:

OCT 2 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH E. NORTH,

Petitioner,

vs. No. 75-334

PATRICIA ANNE SANTEE,
formerly PATRICIA ANNE NORTH,

Respondent.

MOTION TO FILE TYPEWRITTEN
BRIEF IN OPPOSITION

Comes now respondent and moves the Court for an order allowing respondent to file a typewritten brief in opposition herein for the reason that respondent cannot afford to pay the costs of printing same. The costs of this litigation (motion by opposing party for marriage counseling, contested divorce trial, appeal by opposing party to the Supreme Court of Kansas, motion for rehearing by opposing party in the Supreme Court of Kansas, motion by the opposint party for a stay of proceedings in the Supreme Court of Kansas) have been a great financial burden to respondent.

JOHN H. JOHNTZ, JR.
PAYNE & JONES, CHARTERED
The Tower Building, Box 151
Olathe, Kansas 66061
913 782-2500

ATTORNEY FOR RESPONDENT

BLEED THROUGH

CERTIFICATE OF MAILING

STATE OF KANSAS)
) SS:
COUNTY OF JOHNSON)

JOHN H. JOHNTZ, JR., of lawful age, upon his oath being first duly sworn, states that three true and correct copies of the above and foregoing motion to file typewritten brief in opposition were deposited in the United States Mail, postage prepaid, to Kenneth E. North, 5537 Neosho Lane, Shawnee Mission, Kansas, 66205, this 30th day of September, 1975.

John H. Johntz, Jr.